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INDOOR AIR QUALITY: OPTIONS FOR REGULATING ENVIRONMENTAL TOBACCO SMOKE

Haley M. Peerson*

Environmental tobacco smoke ("ETS"), commonly known as secondhand smoke, is the mixture of smoke emitted from burning tobacco products and smoke exhaled by smokers.¹ Not only is ETS a pollutant to indoor air, it is harmful to nonsmokers inhaling that air, a phenomenon called "passive smoking."² Nonsmokers are exposed to ETS in their everyday lives while at work, during recreational activities, and often in their own homes. The effects of this frequent exposure are unhealthy and sometimes deadly.

Although the health risks of ETS have been known for many years, very little has been done in the United States to protect nonsmokers from these risks. Federal law currently only prohibits smoking on certain commercial flights, most non-chartered motor common carriers traveling interstate, and in all indoor government buildings.³ Although little has been done, there are numerous options for the regulation of ETS at the federal, state, and local levels. This paper will begin by addressing the constitutionality of ETS regulation, and then discuss whether regulation is necessary, taking into account the endowment effect and market forces. Further, I will introduce various options for ETS regulation, including the effect of no regulation, as well as regulation at the federal, state, and local levels.

II. CONSTITUTIONALITY OF ETS REGULATION

In order for any level of government to place restrictions on

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¹ INDOOR AIR QUALITY A COMPREHENSIVE REFERENCE BOOK 125 (Marco Maroni, Bernd Seifert, & Thomas Lindvall eds., 1995) (hereinafter "INDOOR AIR QUALITY").

² *Id.* at 125-26.

³ NYC C.L.A.S.H., Inc. v. City of New York, 315 F.Supp. 2d 461, 489 (S.D.N.Y. 2004); see 49 U.S.C. § 41706 (2005); 49 C.F.R. § 374.201 (2006); Exec. Order No. 13,058, 62 Fed. Reg. 43,451 (Aug. 9, 1997).

smoking indoors, such restrictions must pass constitutional muster. Legislation that bans smoking in all restaurants and bars raises numerous constitutional issues, including freedom of speech, freedom of assembly, and equal protection. Courts that have addressed the constitutionality of smoking bans have consistently upheld the regulations as constitutional.

A. Freedom of Speech

Freedom of speech is promulgated by the First Amendment, which includes protection for symbolic speech.⁴ However, protection is not afforded to mere conduct.⁵ In order to determine whether the act of smoking is protected symbolic speech, or simply unprotected conduct, the court must apply the two-part test set out in *Spence v. Washington*.⁶ First, the speaker must intend to convey a particularized message.⁷ Second, there must be a great likelihood that someone viewing the message would understand it.⁸ If both parts of this test are not satisfied, the conduct is not considered symbolic speech and is thus not protected under the First Amendment.⁹

Smokers have argued that smoking is a part of their identity.¹⁰ Some smokers maintain, for example, that “for a smoker, ‘smoking is indeed part of the person’s life and certainly his social life and crucially, more than that, *a part of his identity*’ Smoking bans ‘so abridge smokers’ enjoyment of socializing in public as to render both enjoyment and socializing impossible.’”¹¹ Specifically, smokers have argued that smoking is a form of political speech, similar to flag burning.¹² Smoking is an act of “rebellion against a State and a state of . . . affairs for which

⁴ U.S. CONST. amend. I.

⁵ *See id.*

⁶ *Spence v. Washington*, 418 U.S. 405 (1974).

⁷ *Id.* at 410-11.

⁸ *Id.* at 411.

⁹ *See id.* at 412. In determining whether flying a United States flag with a peace symbol affixed to it was symbolic speech as opposed to mere conduct, the Court stated, “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” *Id.* at 410-11.

¹⁰ *NYC C.L.A.S.H., Inc.*, 315 F.Supp. 2d at 477.

¹¹ *Id.* (quoting position papers written by Linda Stewart).

¹² *Id.*

smokers feel a righteous rage of revulsion.”¹³

Some smokers may possibly smoke for the purpose of expressing a particularized message such as that argued above. However, each time an individual lights a cigarette, it is unlikely that the smoker considers his or her cigarette a form of particularized speech. The smoker is probably more concerned with satisfying the addiction than sending any type of message.

Even if smokers intended to send a certain message, it is highly unlikely that anyone present would understand that message.¹⁴ Smokers have argued that smoking conveys a “[r]elax, I’m your friend” message to other smokers.”¹⁵ The Southern District of New York has discredited this argument, stating that, “[w]hether smokers share some clandestine language not readily available to non-smokers . . . does not propel the act of smoking within the zone of First Amendment protection.”¹⁶ Since smoking conveys no message that is understood by those viewing it, smoking is merely conduct, which may be regulated.

Even if smoking were considered symbolic speech, it is likely that restrictions limiting forums that allow smoking would survive intermediate review.¹⁷ The government’s interest in prohibiting smoking in bars and restaurants is to protect nonsmokers from the detrimental effects of ETS.¹⁸ Protecting the health and welfare of citizens is a well-established substantial government interest. Also, there are numerous alternative avenues of “expression” for smokers.¹⁹ Smoking is not restricted in city streets, homes, automobiles, or hotel rooms.²⁰ So if smoking were to be classified as symbolic speech and receive full First Amendment protection, a forum restriction would pass constitutional muster because it is supported by a substantial purpose and smokers are

¹³ *Id.*

¹⁴ *Id.* at 478.

¹⁵ *Id.* at 479 n.12.

¹⁶ *Id.*

¹⁷ *Id.* at 480. As a content-neutral restriction, a forum restriction on protected symbolic speech may be upheld if supported by substantial reasons and if there are adequate alternative channels for the speech. *Id.*

¹⁸ *Id.* at 480.

¹⁹ *Id.*

²⁰ *Id.*

free to "speak" their message elsewhere.²¹

B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."²² Smokers argue that prohibiting the very conduct that defines them as a class is discriminatory. Specifically, "criminalizing the *defining conduct* of smokers in all realms of their public lives . . . both demeans and stigmatizes smokers as a class, and invites discrimination in both public and private spheres."²³

In order to receive heightened protection under the Equal Protection Clause, discrimination must occur to members of a class.²⁴ Smokers have never been deemed a class deserving of protection under the Fourteenth Amendment's Equal Protection Clause. Moreover, smokers do not have the necessary characteristics to be considered a class. Foremost, persons become smokers voluntarily. "The Supreme Court has rejected the notion that a classification is suspect when entry into the class . . . is the product of voluntary action."²⁵

If smokers were considered a class for the purpose of equal protection, they would still not be guaranteed protection from any restraint. "[P]ersons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State."²⁶ The burdens placed on society in order to protect the general health and welfare are always more restrictive on some more than others.

This has been especially true for clean air and environmental

²¹ *Id.*

²² U.S. CONST. amend. XIV § 1.

²³ *NYC C.L.A.S.H., Inc.*, 315 F.Supp. 2d at 481 (quoting position papers written by Linda Stewart).

²⁴ *Id.* at 481. When defining a class, courts have traditionally looked to whether members are a discrete and insular minority, have immutable characteristics, have a history of prejudice, and are politically powerless. *Id.* at 482; see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-43 (1985).

²⁵ *Id.* (quoting *United States v. Coleman*, 166 F.3d 428, 431 (2d Cir. 1999)); see *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

²⁶ *Id.* (quoting *Slaughter House Cases*, 83 U.S. 36, 62 (1872)).

controls.²⁷ For example, regulations on factory emissions are clearly more restrictive on factory owners than on any other individuals. Such regulation, however, does not constitute discrimination in violation of the Equal Protection Clause because factory owners make a conscious choice to work in that profession. Like factory owners, smokers emit harmful toxins, which pollute the air and cause health risks. Although regulation of smoking may be more restrictive on smokers than nonsmokers, the distinction is necessary to protect the health and welfare of the general public.

C. Freedom of Association

The government violates a person's freedom of association when the government intrudes on a person's choice to "enter into and maintain certain intimate human relationships,"²⁸ or when the government interferes with association that is fundamental to activities otherwise protected by the First Amendment.²⁹ Smokers have argued that a ban on smoking in bars and restaurants so substantially burdens the right to assemble as to effectively void it altogether.³⁰ Essentially, smokers assert that while they are able to assemble, they are unable to fully engage in and enjoy activities in bars and restaurants without being able to smoke.³¹

It is curious that smokers do not believe they are fully able to engage in association at restaurants and bars without smoking, while nonsmokers are able to fully associate without smoking. Moreover, nonsmokers may argue that they are unable to fully engage in their right to associate because of the harmful ETS contaminating the air. As expanded in section III below, the fundamental choice is between the right to smoke and the right to breathe clean air.

Courts have agreed that, "there is nothing to say that smoking is a prerequisite to the full exercise of association and speech under the First

²⁷ *Id.*

²⁸ *Id.* at 472 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-19 (1984)).

²⁹ *Id.*

³⁰ *Id.* at 473. Smokers in *NYC C.L.A.S.H., Inc.* asserted that while their ability to associate was not technically interfered with, it was "so substantially burdened, so utterly abridged and so encumbered with humiliation as to virtually be voided." *Id.*

³¹ *Id.*

Amendment.”³² Although unable to smoke, smokers remain free, as do all other individuals, to associate in bars and restaurants. Smokers, just like nonsmokers, are fully able to exercise their constitutional rights without smoking. Further, “First Amendment freedoms warrant no constitutional protection when such activities are not essential to the enjoyment of a particular right, or may otherwise be harmful to public health, safety, order, or general welfare.”³³

III. REGULATION

A. Reasonableness of Regulation

When deciding whether regulation of a behavior is necessary, it is important to weigh the utility of the conduct against the gravity of the harm. Using speed as an example, the utility of driving fast is reducing drive time for some and enjoyment for others. The gravity of the harm caused, however, is injury and often death to the driver as well as to third-persons. Thus, because the potential for injury far outweighs the benefits, speed is regulated. The regulation may have negative effects on those who enjoy driving fast or are running late, but the regulation is necessary.

Similar to speeding, smoking causes harm and often death to the smoker as well as to third-persons. It is argued that smoking is enjoyable to the smoker.³⁴ Other utilities of smoking may include satisfaction of an addiction or ease in socializing. However, similar to the enjoyment some experience by driving fast, the enjoyment smokers receive is far outweighed by the gravity of the harm that it causes to smokers and nonsmokers. This harm includes sickness and even death. Using this balancing test, the government should regulate smoking in bars and restaurants because the harms caused by smoking are unreasonable risks that outweigh the limited benefits to smokers.

B. Non-Regulatory Options

³² *Id.*; see *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

³³ *Id.* at 474.

³⁴ *Id.* at 472.

Some have argued that governmental regulation is not needed because consumers and employees will use the market to demand nonsmoking establishments if that is truly what they want.³⁵ However, the problem with non-regulation is that in order for the market to work properly, there must be a combination of perfect knowledge and mobility between jobs.³⁶ When it comes to ETS, many consumers and persons in the workforce do not have perfect knowledge of the risks caused by ETS.³⁷ Because many of the injuries caused by ETS are long-term as opposed to presenting immediate and clear dangers, people do not have the incentive to become fully informed of the health and safety risks.³⁸ When it comes to health and safety risks at work, employers do not have the incentive to fully inform their employees of the risks of ETS.³⁹ Typically, employers do not want to provide their employees with information that could link their establishment to the employee's future health problems stemming from "occupational exposure" to cigarette smoke.⁴⁰

In order to more fully inform the public about the health and safety risks of ETS, the EPA has begun an informational campaign, which focuses on educating the public about the ways to reduce the effects of ETS on one's health.⁴¹ While an informational campaign is the first step towards perfect knowledge, it is far from sufficient. As noted, consumers and employees do not have the incentive to become fully informed of long-term health and safety risks.⁴² Therefore, a mere informational campaign is not sufficient to correct the market failure of imperfect knowledge.

In addition to the lack of perfect knowledge, employees and many consumers are not able to be perfectly mobile in the marketplace.⁴³

³⁵ Professor Thomas Lambert in his article, *The Case Against Smoking Bans*, which begins on page 94 of this issue, is one such author to make this argument.

³⁶ Indoor Air Quality, 59 Fed. Reg. 15,968, 16,008 (April 5, 1994).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ INDOOR AIR QUALITY, *supra* note 1, at 880; see Environmental Protection Agency, <http://epa.gov/iaq/ets/>.

⁴² Indoor Air Quality, 59 Fed. Reg. at 16,008.

⁴³ *Id.*

People who work in bars and restaurants do not have many employment opportunities where ETS exposure does not pose a health risk because for the most part, that line of work tolerates ETS exposure.⁴⁴ If an employee of a bar or restaurant had perfect knowledge of the risks of ETS exposure and made the decision not to work where they were exposed to ETS, they would probably be forced into unemployment.⁴⁵ Similarly, consumers are faced with the decision of either frequenting bars and restaurants where smoking is allowed or not entering the market. Thus, a lack of governmental regulation is ineffective in protecting nonsmokers from the health risks associated with ETS.

Opponents of regulation have made other arguments such as reliance upon tort litigation and reliance on workers' compensation programs.⁴⁶ Opponents claim that these two systems would work to protect employees from ETS exposure, which in turn would prevent ETS exposure in bars and restaurants by the public.

If the tort system applies, it would allow a worker whose health has been adversely affected by occupational exposure to [ETS] to sue and recover damages from the employer. Thus, if the tort system is effectively applied, it might shift the liability of direct costs of occupational disease from the worker to the firm under certain specific circumstances.⁴⁷

The tort system, however, is an ineffective alternative to ETS regulation. First, all states require employees with an occupational injury to utilize the Workers' Compensation system as the exclusive or principal remedy.⁴⁸ Employees are unable to use the tort system to sue their employers. Therefore employees cannot shift the costs of damages caused by ETS exposure to the employers.⁴⁹

Second, tort litigation cannot be successful without "specific knowledge of the magnitude and duration of a worker's exposure to [ETS], as well as the causal link between the disease and the occupational

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

exposure.”⁵⁰ This is a problem with occupational exposure to ETS because the health problems from ETS exposure may not appear for many years.⁵¹ Further, these problems are difficult to link specifically to ETS exposure.⁵² Also, many workers will have several employers, all of which may have exposed the worker to ETS.⁵³ It is difficult in these cases to causally link ETS exposure at a specific workplace to the resulting damages.⁵⁴

Finally, employees of bars and restaurants may find it impossible to access the tort system in order to seek compensation for their damages caused by ETS exposure. Compared to other places of employment, bars and restaurants have extremely high levels of ETS. Further, employees of bars and restaurants are often lower class individuals. Accessing the tort system is costly and time consuming. Making employees of bars and restaurants rely on the tort system to protect themselves from health risks caused by ETS is essentially affording them no protection. Those individuals who are most harmed by ETS exposure would be left with a remedy which they are unable to utilize because of high costs and low wages.

The Workers’ Compensation system also provides inadequate protection to those employees who are exposed to ETS at work.⁵⁵ Compensation provided through Workers’ Compensation programs is generally restricted and inadequate for permanent disability cases.⁵⁶ Further, it is difficult to prove the causal connection between the disease and occupational exposure to ETS.⁵⁷

The Workers’ Compensation system does not provide employers with an incentive to reduce health hazards caused by ETS.⁵⁸ Employers obtain insurance to cover Workers’ Compensation claims.⁵⁹ These

⁵⁰ *Id.* at 16009.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* Benefits under Workers’ Compensation have an expiration period; they also do not adjust for changes in expected earnings. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

insurance premiums, however, are not reflective of an employer's health and safety record.⁶⁰ The best way for a class of employers to reduce their insurance premiums is to contest claims brought by their employees.⁶¹ Because the Workers' Compensation system limits the employer's liability, there is no incentive for the employer to reduce health risks caused by ETS.⁶² The Workers' Compensation system is an ineffective way to protect employees and the public from the health hazards caused by ETS exposure.

C. Endowment Effect

A phenomenon known by economists as the endowment effect has shown that people place more value on something once they own it.⁶³

⁶⁰ *Id.* Smaller sized employers, which make up about 80 percent of all employers, are ineligible for experience ratings. *Id.* These firms are taken as a class for insurance purposes, and premiums will only reduce if the health and safety ratings of the entire class reduce. *Id.*

⁶¹ *Id.* The premiums are based on benefits paid to employees. *Id.* Because of this, employers have a greater incentive to contest claims that have been brought than to create a safer work environment. *Id.*

⁶² *Id.*

⁶³ Leaf Van Boven, George Loewenstein, and David Dunning, *Mispredicting the Endowment Effect: underestimation of owners' selling prices by buyer's agents*, 51 J. OF ECON. BEHAVIOR AND ORG. 351-52 (2003) available at

http://www.hss.cmu.edu/departments/sds/faculty/Loewenstein/downloads/vb_loew_dun_jebo.pdf.

Loewenstein and Adler conducted a series of studies in which individuals predicted their own lowest selling price for an object they did not yet possess. In one study, subjects were shown a coffee mug, told that it would be given to them [one] week later, and asked to predict the minimum price for which they would be willing to sell the mug. The mug was subsequently given to them and they stated actual minimum selling prices. Subjects significantly underestimated what their own selling prices would be. In another study, some subjects (potential owners) were told that there was a 50 percent chance that they would receive a coffee mug, and stated the minimum price for which they would sell the mug if they were to receive it []. Other subjects (actual owners) were given a mug, and stated their minimum selling price for the mug []. Potential owners stated much lower selling prices than actual owners [], even though in both cases their stated selling prices determined whether they actually sold their mugs. A third group of subjects (choosers) who did not have mugs were asked to state a "choice price": the lowest price at which they would choose to receive the mug rather than the money []. Consistent with the endowment effect, choice prices were lower than

Even when the market value of two items may be the same, most individuals will place more value on the item that they own.⁶⁴ Moreover, once individuals have ownership of something, they are reluctant to part with it, even if they may not have preferred it prior to their ownership.⁶⁵

The endowment effect may shed light on the controversy over the right to smoke versus the right to breathe clean air. When persons are endowed with rights, they will value them more than if they had never been given those rights. Although the government has never specifically given smokers a legal right to smoke, smokers have historically been endowed with the right to smoke. As such, smokers will place a high value on the right to smoke in locations where they have historically been allowed to smoke. Nonsmokers have never had the right to breathe clean air. Accordingly, nonsmokers do not currently place a high value on this luxury. Because nonsmokers have become accustomed to frequenting bars and restaurants where smoking is commonplace, they will not place a high value on the ability to attend bars and restaurants that are smoke-free. Consistent with the endowment effect, if the government were to give nonsmokers the right to breathe clean air in bars and restaurants, nonsmokers would place a higher value on their right to breathe smoke free air. If the federal government, or all state and local governments, regulated smoking in bars and restaurants, nonsmokers would begin to value their rights to breathe clean air and demand that right in all locations.

If in fact the government regulated smoking in all bars and restaurants, new patrons may frequent those locations where smoking is not permitted. When this occurs, those establishments where smoking is permitted may lose profits to establishments with a prohibition on smoking. Thus in order to meet consumer demand, many establishments may completely prohibit smoking without further governmental regulation.

The endowment effect shows that there may be a need for a limited smoking ban, at least for a period of time long enough to shape consumer preferences. Consumers may not fully value the "right to breath clean air"

owners' selling prices.

Id. at 352.

⁶⁴ *Id.*

⁶⁵ *Id.*

because they have never had this right. If consumers were given the right, the endowment effect shows that they would place a higher value on that right. As such, a time-limited regulation would enable consumers to form preferences on smoking versus nonsmoking establishments. Once these preferences and values are formed, the market would more effectively reflect consumer preferences. Even after the smoking ban is lifted, consumers will use the market to demand smoking or nonsmoking establishments based on preferences formed during the ban.

Finally, any amount of government regulation of smoking brings the health risk of ETS to the forefront. Many nonsmokers who are unaware of the health risks to themselves may not have a problem with exposure to ETS. However, when the issue is highlighted by government regulation, nonsmokers will begin to realize that the health risk is a true concern. If nonsmokers are adequately informed of the serious effects of ETS exposure, it is likely that they will put more pressure on elected officials to protect nonsmokers from these effects.

V. OPTIONS FOR FEDERAL REGULATION

Federal regulation of ETS in bars and restaurants is virtually nonexistent. Research and development programs have been established to study the effects of ETS and possible regulatory schemes.⁶⁶ However, the federal government has not initiated any regulation in order to control ETS in such establishments.

Such regulation could fall under the jurisdiction of the EPA or OSHA. Both agencies have either proposed regulation or begun research programs to control ETS.⁶⁷ However, the effectiveness of actions taken by the EPA and OSHA to date is minimal.

A. *Environmental Protection Agency*

Congress established the Environmental Protection Agency ("EPA") to, "protect human health and the environment."⁶⁸ Likewise, the

⁶⁶ Indoor Air Quality, *supra* note 1.

⁶⁷ See Environmental Protection Agency, <http://www.epa.gov/epahome/aboutepa.htm#mission>; see also Indoor Air Quality, 59 Fed. Reg. at 15,968.

⁶⁸ Environmental Protection Agency, <http://www.epa.gov/epahome/aboutepa.htm#mission>.

Clean Air Act gives the EPA the power to regulate ambient air quality.⁶⁹ However, the Clean Air Act governs ambient air, which has been defined to exclude indoor air.⁷⁰

Although the EPA has not been given the authority to regulate indoor air, Congress has authorized the EPA to perform research and establish possible regulations for indoor air.⁷¹ However, the Radon Gas and Indoor Air Quality Research Act (“Radon Act”), which instructs the EPA to perform this research and development, explicitly prohibits the EPA from enacting standards to regulate indoor air.⁷² The Radon Act states that, “[n]othing in this title shall be construed to authorize the Administrator to carry out any regulatory program or activity other than research, [and] development”⁷³

As instructed by the Radon Act, the EPA published a report in 1993 addressing the problems of indoor air quality.⁷⁴ The report classified ETS as a known human carcinogen.⁷⁵ Moreover, the report acknowledged that ETS caused lung cancer resulting in over 3,000 nonsmoker deaths.⁷⁶

In addition to the report recognizing ETS as a major health hazard for the nonsmoking public, the EPA has developed an education and outreach program to better inform the public about the hazards of ETS on nonsmoking adults and children.⁷⁷ The EPA has focused on teaching the public how to reduce the effects of ETS on their own health.⁷⁸ For example, there is a pledge sheet on the EPA’s website encouraging parents

⁶⁹ 40 C.F.R. § 50.2(b) (2006).

⁷⁰ 40 C.F.R. § 50.1(e). For purposes of the Clean Air Act, “ambient air means that portion of the atmosphere, external to buildings, to which the general public has access.” *Id.*

⁷¹ See 42 USC § 7401 (2005); Radon Gas and Indoor Air Quality Research Act of 1986, Pub.L. 99-499, Title IV, §§ 401-405 (Oct. 17, 1986) (*reprinted in* 42 U.S.C. § 7401 note) (hereinafter “Radon Act”). The Radon Act, established in 1986, was based on the finding that the pollutants in indoor air (mainly, radon) posed a health risk to the public. *Id.* § 402. The EPA was charged with researching the contaminants of indoor air and the effects of those contaminants on the public. *Id.* § 403. Further, the EPA was to evaluate potential actions that could be taken to reduce the risks to the public. *Id.*

⁷² *Id.* § 404.

⁷³ *Id.*

⁷⁴ EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (Dec. 1992), available at <http://cfpub2.epa.gov/ncea/cfm/recorddisplay.cfm?deid=2835>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See EPA, *Indoor Air – Smoke-free Homes Program*, available at <http://www.epa.gov/iaq/ets/>.

⁷⁸ *Id.*

to pledge to have smoke-free homes and automobiles.⁷⁹

The EPA's current approach to protecting the nonsmoking public from the health risks posed by ETS is weak. Because Congress has specifically prohibited the EPA from regulating indoor air, the EPA has been unable to protect the general health and safety of the public. Encouraging the public to protect themselves at home may protect a few children from the hazards of ETS. However, this is a small percentage of the general public harmed each day by ETS exposure. The government must take additional action to protect the working public and those exposed to ETS outside of their homes.

While the EPA has addressed the problems posed by ETS pursuant to the Radon Act, Congress needs to do more to protect the nonsmoking American public. If the federal government were to take action, Congress must first address the issue. Congress has explicitly forbid the EPA from regulating indoor air.⁸⁰ As such, Congress must consider the research performed by the EPA under the Radon Act and take steps to begin regulation. Obviously, Congress suspected a problem with indoor air quality and ETS in 1986 when it passed the Radon Act. Based on this suspicion, Congress demanded the EPA research the issue and develop possible strategies to reduce the risks of ETS. Now that the EPA has done the research, the government must take action to implement these strategies.

There are numerous options for regulation of ETS, some of which the EPA has analyzed. The first option, which the EPA has proposed, is merely to educate the public and allow market forces to take effect. As discussed above, however, the market-based approach is not appropriate for ETS regulation because the public is not perfectly informed of the dangers of ETS and there is not "perfect employee mobility between jobs."⁸¹

A second option for federal regulation of ETS is to create a Clean Indoor Air Act, giving the EPA the authority to regulate ETS as needed.

⁷⁹ *Id*; see EPA, *Take the Smoke-free Home Pledge*, available at

<http://www.epa.gov/iaq/ets/pledge/index.html>. By taking the smoke-free pledge, parents are able to print out a smoke-free home sign, and receive valuable information on how to maintain a smoke-free home. *Id*.

⁸⁰ See Radon Act § 404.

⁸¹ Indoor Air Quality, 59 Fed. Reg. at 15,968.

Once the EPA has this authority, it must determine the most effective way to regulate ETS. Although dramatic, the most effective form of regulation is to completely prohibit smoking in all indoor establishments.⁸² If an absolute prohibition were passed and enforced, health risks to nonsmokers would decrease dramatically.⁸³

Many restaurants currently have separate smoking sections. These sections, however, have no separate ventilation. While having separate smoking sections is one option for regulation, it provides little protection for the nonsmoker.⁸⁴ Although the act of smoking occurs in a limited location, the ETS does not remain in that area. Even without entering the designated smoking area, nonsmokers are exposed to large amounts of ETS. This ETS, although not as direct, still poses a tremendous health risk to nonsmokers.

A third option for regulation, which has been suggested by the EPA, is to require all buildings where smoking is permitted to have designated smoking rooms with separate ventilation systems.⁸⁵ While this option reduces the amount of ETS outside of the separately ventilated smoking area, it does not completely eliminate all nonsmoker exposure to ETS.⁸⁶ If this option were used in bars and restaurants, employees of those bars and restaurants would remain unprotected. Employees who are required to enter the smoking areas as part of their employment will be exposed to significant amounts of ETS.⁸⁷ In addition to not fully protecting nonsmokers, these ventilated smoking areas are costly.⁸⁸

⁸² IARC MONOGRAPHS, *supra* note 3, at 1216.

⁸³ See Mark Travers and Andrew Hyland, PhD, *Indiana Air Monitoring Study, December 2004-January 2005* (April 2005), available at http://www.in.gov/itpc/files/research_238.pdf. The Indiana Air Monitoring Study measured the levels of particulate matter, which is caused by ETS, inside bars and restaurants before and after the instigation of a ban on smoking. *Id.* The levels of air pollution were 94% lower where smoking was prohibited. *Id.* at 2.

⁸⁴ IARC MONOGRAPHS, *supra* note 82 3, at 1216 (“Studies have shown that substantial exposure to secondhand tobacco smoke occurs in workplaces where there are smoking areas without separate ventilation”).

⁸⁵ *Id.*; see Indoor Air Quality, 59 Fed. Reg. at 15,968.

⁸⁶ *Id.*

⁸⁷ *Id.* Separately ventilated smoking rooms also increase lung cancer risk in smokers. *Id.*

⁸⁸ *Id.*

B. Occupational Safety and Health Act

The mission of the Occupational Safety and Health Administration (“OSHA”) is, “to assure the safety and health of America’s workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health.”⁸⁹ As an administrative agency, OSHA establishes and enforces regulations in order to meet the goal of providing all American workers with a safe and healthy workplace.⁹⁰ In addition to regulation, OSHA encourages management, through the use of technical assistance and consultation programs, to establish workplace health and safety programs.⁹¹

The Occupational Health and Safety Act authorizes OSHA to carry out its mission of providing safe and healthy working conditions.⁹² The Act gives OSHA the power to not only encourage safe and healthy workplaces but also to set mandatory standards in order to achieve that goal.⁹³ These standards may require “conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment.”⁹⁴ Therefore, if OSHA determines it is reasonably necessary to take action in the workplace, it is authorized to do so.⁹⁵

Under its authority granted by Congress, OSHA seems to have the ability to regulate all aspects of the workplace as long as the regulations affect the health and safety of employees. As such, ETS and indoor air quality seem to be within the jurisdiction of OSHA. To date, however, Congress has not passed any regulation addressing the effects of ETS.

In 1994, OSHA proposed regulations to control ETS in workplaces.⁹⁶ This proposal acknowledged the detrimental effects of ETS

⁸⁹ U.S. Department of Labor, Occupational Safety and Health Administration, <http://www.osha.gov/oshinfo/mission.html> (last visited Apr. 2, 2006).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 29 U.S.C. § 651(b) (2005).

⁹³ *Id.*

⁹⁴ 29 U.S.C. § 652(8) (defining “occupational safety and health standard”).

⁹⁵ *Id.*

⁹⁶ See Indoor Air Quality, 59 Fed. Reg. at 15,968.

on all employees.⁹⁷ OSHA estimated that between 144 and 722, or one in one thousand nonsmoking workers will get lung cancer because of exposure to ETS in the workplace.⁹⁸ Further, over 74 million nonsmoking American workers will be exposed to this risk yearly.⁹⁹ In addition to cancer, between 2,094 and 13,000 nonsmoking workers will die each year from heart disease.¹⁰⁰

The Supreme Court acknowledged the serious health risks of ETS in the workplace.¹⁰¹ OSHA classified this risk as a, "significant risk of material impairment," to the health of all employees.¹⁰² Because of the significance of the risk to the health and safety of all employees, regulation of ETS seems "reasonably necessary" or even critical to protect employers and employees.¹⁰³

OSHA's proposed rule for the regulation of indoor air quality mandated employers to develop and implement indoor air quality compliance plans.¹⁰⁴ These plans would protect nonsmoking workers from the significant risks posed by ETS.¹⁰⁵ Specifically the rule promulgated that no employer could require its employees to work in areas where they would be exposed to ETS.¹⁰⁶ Workplaces were not required to implement an absolute prohibition against smoking.¹⁰⁷ However, if smoking were allowed on the premises, the employer must provide a separately enclosed and separately ventilated room.¹⁰⁸

⁹⁷ *Id.*

⁹⁸ *Id.* at 16,000.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; see *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 655 (1980) (Explaining significant risk, the court stated, "[i]t is the Agency's responsibility to determine, in the first instance, what it considers to be a 'significant' risk. Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it").

¹⁰² *Id.*

¹⁰³ See *id.*; 29 U.S.C. § 652(8).

¹⁰⁴ Indoor Air Quality, 59 Fed. Reg. at 15,968.

¹⁰⁵ *Id.* at 16,001.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The separately enclosed and ventilated room must be the only designated location where smoking is allowed. *Id.* With separate ventilation, ETS exposure to nonsmokers is reduced, but

While this rule, proposed by OSHA in 1994, was never approved, it was significant for the future of potential ETS regulation in bars and restaurants. First, OSHA acknowledged that ETS created a significant risk for nonsmoking workers.¹⁰⁹ This is the first step towards regulating ETS. Now that a federal agency has recognized the risks of ETS, these risks will be taken more seriously, and research can be done to find the most effective ways to address these risks.

Further, OSHA attempted to assert its jurisdiction over the regulation of indoor air among workplaces, including bars and restaurants. While many private employers do not allow smoking in the workplace, bars and restaurants typically allow employees and patrons to smoke. Therefore, employees in bars and restaurants have the greatest risk of exposure to ETS, and thus are the least protected class of employees.¹¹⁰

The lack of regulation in bars and restaurants may actually present a problem with discrimination. Data suggests that the lower class, service workers, and racial and ethnic minorities are more likely than other workers to be exposed to ETS in the workplace.¹¹¹ A majority of these workers are employees of bars and restaurants, where there often is not proper ventilation, and in some cases, the establishment does not even have a designated no smoking area. Therefore, persons employed by bars and restaurants often have no protection against the risks of ETS. They are exposed to the dangers daily and are not offered any options to protect themselves.

Since OSHA has acknowledged ETS as a problem and asserted its jurisdiction over the matter, progress is being made. All workers have the right to a safe and healthy workplace. Their lives should not be put at risk on a daily basis so that they are able to provide for their families. OSHA provides protection for employees in danger in the workplace. There is no reason OSHA should not also protect against the significant risk posed

not eliminated.

¹⁰⁹ *See id.* at 15,968.

¹¹⁰ IARC MONOGRAPHS, *supra* note 3, at 1217. note 82...can't find source?

¹¹¹ *Id.* "Exposure to secondhand tobacco smoke is related to occupation and socioeconomic status, . . . higher exposure is more common among adults employed in Blue-collar jobs, service occupations, and poorly paid jobs and among the less well educated. Exposure to secondhand tobacco smoke may also be higher among racial and ethnic minority groups in areas of the USA." *Id.* at 1209.

by ETS.

VI. OPTIONS FOR STATE AND LOCAL REGULATION

Smoking in restaurants and bars has been addressed at a state and local level. Currently, seven states and numerous cities and municipalities have enacted clean indoor air regulations, which extend to restaurants and bars.¹¹²

The risk caused by ETS to employees was first addressed by the Missouri Court of Appeals in 1982 in *Smith v. Western Electric Company*.¹¹³ In *Smith*, a nonsmoking employee (“Smith”) brought an action against his employer for allowing him to be exposed to ETS daily in his workplace.¹¹⁴ Smith began experiencing severe respiratory tract discomfort as a result of his continual exposure to ETS at work.¹¹⁵ Smith claimed that Western Electric failed to provide him with a reasonably safe workplace.¹¹⁶

The court analyzed Smith’s claims utilizing the well-known common law rule in Missouri that, “an employer owes a duty to the employee to use all reasonable care to provide a reasonably safe workplace.”¹¹⁷ Because ETS was a health hazard not only to Smith, but also to all employees, and because Western Electric had the means necessary to control the hazard, Western Electric breached its duty.¹¹⁸ The court held that, “by failing to exercise its control and assume its

¹¹² Mark Travers and Andrew Hyland, PhD, Dep’t of Health Behavior, Roswell Park Cancer Inst., *Indiana Air Monitoring Study, December 2004 - January 2005*, (April 2005) available at http://www.in.gov/itpc/files/research_238.pdf. The seven states that have enacted such comprehensive clean indoor air legislation include California, Delaware, New York, Maine, Connecticut, Massachusetts, and Rhode Island. *Id.*

¹¹³ See *Smith v. W. Elec. Co.*, 643 S.W.2d 10 (Mo.App. E.D. 1982).

¹¹⁴ *Id.* at 12. The employee had been employed by Western Electric since 1950. *Id.* Throughout his employment, he shared an open office with smoking employees. *Id.*

¹¹⁵ *Id.* A medical evaluation determined that Smith had a severe reaction to ETS. *Id.* Smith’s symptoms included a sore throat, nausea, dizziness, headache, blackouts, loss of memory, difficulty in concentration, joint pains, sensitivity to noise and light, cold sweat, gagging, choking sensations, and lightheadedness. *Id.* Not only were Smith’s reactions medically linked to exposure to ETS in the workplace, Smith’s symptoms began to discontinue during a period when he was not exposed to ETS. *Id.*

¹¹⁶ *Id.* at 13.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

responsibility to eliminate the hazardous condition caused by tobacco smoke, defendant has breached and is breaching its duty to provide a reasonably safe workplace.”¹¹⁹ Because Smith’s injuries were irreparable, the court granted Smith an injunction to prevent smoking in the workplace.¹²⁰

Also in *Smith*, Western Electric argued that the court did not have jurisdiction to impose an injunction because hazardous workplaces are controlled by OSHA and are thus preempted.¹²¹ The court held that since OSHA had no standards for the regulation of ETS, the courts are able to provide a remedy for individuals harmed by their employees from exposure to ETS.¹²²

The Missouri Court of Appeals made it clear that workplace ETS created a hazardous condition to all employees.¹²³ Moreover, employers are fully capable of controlling this hazard by making their establishments smoke-free.¹²⁴ As such, employers have a duty to provide their employees with a smoke-free workplace.¹²⁵

A. Enforcement

While many jurisdictions have already banned smoking in bars and restaurants, the enforcement of this ban has proved challenging. Not only are some patrons purposely violating the ban, but bar and restaurant owners are allowing and often even encouraging violations as well.¹²⁶ The key issue in creating smoking bans is how to most effectively write and enforce them.

If enforcing the smoking regulations weren’t difficult enough,

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 13-14.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *L.I. Bars win Big in Legal Ash Fray*, THE UNITED PRO CHOICE SMOKERS RIGHTS NEWSLETTER (The Smoker’s Club, Inc.) Nov.13, 2004, available at www.smokersclubinc.com/modules.php?name=News&file=article&sid=501; see Eric Blanchard, M.A. and Michael E. Begay, Ph.D., *Tobacco Control Policymaking and the Amherst, Massachusetts Bar Smoking Ban*, Dec. 1999, available at www.umass.edu/sphhs/chs/tobacco/monograph_PDFs/amherstbar.pdf.

some bar and restaurant owners set out collection jars to pay off fines and legal fees.¹²⁷ When there is such open violation, nonsmokers are not receiving the protection intended. Work must be done to draft more effective laws which are capable of being enforced against bar and restaurant owners as well as patrons acting in violation of the law. Moreover, enforcement is essential in protecting nonsmokers from the hazards of ETS.

Perhaps less restrictive, statewide regulation would be a more appropriate remedy for health risks caused by ETS. Although a full smoking ban may most effectively protect nonsmokers, it has proven difficult to enforce and is the root of much controversy among smokers. One form of regulation that state governments could consider is providing smoking licenses, similar to liquor licenses. In order to allow smoking in a bar or restaurant, the bar or restaurant owner must purchase a smoking license. The cost of the smoking license will be passed on to consumers. If patrons value their right to smoke, they will frequent those bars and restaurants where smoking is allowed and pay for that right. Nonsmoking patrons will not be willing to pay for a smoking establishment and thus will frequent the nonsmoking bars and restaurants. Bars and restaurants which claim to profit from allowing patrons to smoke will continue to do so, because those smoking patrons will pay a premium for their right to smoke. Further, nonsmoking establishments will profit from nonsmoking patrons who are not willing to pay smoking premiums.

Another option may be regulation of the level of toxins in indoor air rather than the regulation of smokers, who contribute to the pollution. As with ambient air, a specific level of "pollution" or carcinogens would be acceptable. Above this level, however, bars and restaurants would be in violation. When a violation occurs, the bar or restaurant owner would be fined. The fine would reflect the level of the violation. The more pollution, the higher the fine paid.

When bar and restaurant owners have to pay for their patrons to smoke, it is likely that the owners will install separate ventilation systems for smoking areas or take other measures to maintain clean air if they wish to continue allowing smoking in their establishment. This would help to

¹²⁷ See Dave Hitt, *Fighting the New York State Smoking Ban*, <http://www.davehitt.com/facts/fighting.html> (last visited Apr. 2, 2006).

reduce ETS levels below the allowable minimum of pollutants in the air.

In order to make this type of regulation effective, studies must be performed to find an appropriate minimum pollution level. This level should not be too low as to not allow any smoking. In addition, enforcement must be persistent. There should be a quick way to measure pollution levels. These levels must be measured in a consistent manner, and fines assessed at specific intervals. While consistency may require numerous resources, regulation and enforcement are essential to protecting nonsmoking citizens.

Until the advent of federal regulation, states and municipalities alone hold the power to protect the health and welfare of their citizens against the detrimental effects of ETS. By learning from both the successes and failures of pioneering states and municipalities, all states and municipalities in the nation could successfully regulate ETS indoors. In order to protect not only employees but also everyday citizens, the government cannot exempt bars and restaurants from this regulation.

V. CONCLUSION

ETS regulation is crucial to protecting the health, welfare, and even lives of U.S. citizens. While many states have initiated regulation of ETS in bars and restaurants, little protection is actually afforded to nonsmoking citizens. With the issue in the forefront, citizens are becoming increasingly educated about the health risks of ETS. As such, ETS regulation has been highlighted and will continue to be a controversial issue. The controversy itself, however, works to protect more and more nonsmokers by making them aware of the serious health risks of ETS. There are numerous options for the regulation of ETS and protection of nonsmokers around the country. The most effective form of protection, however, is for nonsmoking citizens to demand protection, from both bars and restaurants, and elected officials. It is only when the demands of citizens are truly understood that the market and government will work for its citizens.